BEFORE THE
COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

NOTICE OF INQUIRY/RULEMAKING ESTABLISHING THE PROCEDURES TO BE FOLLOWED IN ELECTRIC INDUSTRY RESTRUCTURING BY ELECTRIC COMPANIES	**)**	**D.P.U./D.T.E. 96-100**

COMMENTS OF INDICATED PARTIES

Pursuant to the Notice of Inquiry dated January 15, 1998, NorAm Energy Management, Inc., Electric Clearinghouse, Inc., Amoco Energy Trading Company, Shell Energy Services Company, L.L.C., and Eastern Power Distribution, Inc. (referred to collectively as "Indicated Parties") file with the Department of Telecommunications and Energy (Department) their comments in the above-captioned proceeding with regard to the regulations and procedures proposed to be adopted in the Notice of Inquiry/Rulemaking order.

BACKGROUND

On November 25, 1997, the Electric Industry Restructuring Act, Chapter 164 of the Acts of 1997 (Act) was signed into law. The Act requires the Department to implement the Legislature's intent and will by promulgating rules and regulations. On January 9, 1998, the Department promulgated emergency regulations governing the licensing of competitive suppliers and electricity brokers. On January 15, 1998, the Department promulgated proposed regulations for the restructuring of the electric industry. The regulations include: (i) the purpose and scope; (ii) applicable definitions; (iii) transition cost recovery; (iv) distribution

company requirements; (v) competitive supplier and electricity broker requirements[1]; (vi) information disclosure requirements; and (vii) complaint resolution procedures.

INITIAL COMMENTS

In the process of deregulating the electric industry, the Indicated Parties -- each of which is interested in becoming a full-fledged competitive supplier -- would counsel against the temptation to reformulate regulations designed for historic regimes rather than just doing away with unnecessary regulations. At this juncture of the deregulation process in Massachusetts, the Department has the opportunity to make a clean break from the regulatory environment that mandated government protections in a monopolistic situation. Many of the requirements addressed in this docket are clearly a carryover from the governmental protectionist role. The Indicated Parties believe that the ability of customers to choose among a number of electric suppliers will replace the need for government regulation of commercial transactions freely entered into by competent contracting parties.

The Indicated Parties hereby submit the following comments on the proposed regulations. Our discussion of the proposed regulations will proceed to track the component parts seriatim and not in order of importance. The Indicated Parties are most concerned with what we consider to be over-extensive licensing requirements and mandatory information disclosure requirements for competitive suppliers and the inhibiting effect which those will have on the development of a robust marketplace. If these requirements are not made less burdensome, it is likely that many

[1] These are substantially identical to the emergency regulations published on January 9, 1998.

competitive suppliers may decide to opt-out of the Massachusetts electricity market and not provide competitive generation services to retail customers.

Indicated Parties recognize that many components of the proposed regulations were mandated by the Massachusetts Legislature. That does not make them sound public policy, however. While the Department may have very little discretion in promulgating these rules, the Indicated Parties strongly encourage the Department to revisit the necessity for such intrusive rules within one year of their implementation. Such a review will allow the Department to determine the impact of the rules and provide informed feedback to the Legislature regarding possible relaxation of the supplier licensing and information disclosure requirements.

Section 2, Definitions.

Although the Indicated Parties do not object to the proposed regulations' definition of "electricity broker", we note an inconsistency with the definition adopted in the emergency regulations. The Indicated Parties request that the Department modify the emergency regulations' definition of "electricity broker" to clearly apply only to entities that arrange for the purchase and sale of electricity to **Retail Customers**. As currently written, the emergency regulations appear to require parties engaged in FERC regulated wholesale power marketing transactions to obtain a Massachusetts license. This is probably unintended and is certainly an unacceptable situation.

The Indicated Parties also suggest that the Department revise the definition of "renewable resources":

> Renewable Resources means a type of Generating Facility or energy source including either (a) ... or (b) existing or emerging non-fossil fuel energy sources or technologies, which have significant potential

for commercialization ~~in New England and New York~~... (emphasis added)

(Attachment A at A-5). While the Indicated Parties appreciate the Department's desire to encourage the use of renewable resources, like solar, wind, ocean and other alternative energies, they do not believe that the definition of renewable resources should be limited to the regions of New England and New York. The reference to a geographically-specific potential for commercialization should be eliminated. Section 11.04 (the Distribution Company Requirements section) states that the purpose of the subsection "is to establish the means by which the Department's goals of customer choice, minimal environmental impact, and resource diversity will be advanced in a restructured electric industry through the availability to customers of energy from Renewable Resources." (Attachment A at A-14). To advance that purpose, competitive suppliers should receive recognition of any renewable resources used, regardless of the technology's location if the resource is being consumed by Massachusetts consumers or if the resource displaces non-renewable energy that would otherwise be consumed in Massachusetts. To maximize the amount of renewable resources utilized, the Department should recognize and validate renewable resources from all geographic sources, domestic or international.

In the Act, renewable resources are discussed a number of times. At Section 11F, a renewable energy generation source is defined and the renewable energy portfolio standard is described. Section 11F does not include any geographical limitation.[2] The Indicated Parties urge the Department to adopt the broader definition of "renewable energy" in its regulations.

[2] The Indicated Parties recognize that later in the Act at Section 190, the Act includes a definition of "renewable energy" which includes the New England and New York reference.

Section 4, Distribution Company Requirements.

Standard Offer Generation Service

Although the Indicated Parties recognize that standard offer service has been addressed in other proceedings, the Indicated Parties must note their concern with Section 11.04 (9)(b)(2)(d). (Attachment A at A-17). A Department requirement that the customer cannot return to standard offer service (or must return in a narrow window of time) after obtaining service from a competitive supplier will have a chilling effect on the customer's interest in choosing a competitive supplier from the outset. Customers should not be precluded from returning to standard offer service as appropriate within a billing cycle. However, if the Department continues to believe that this is necessary to achieve other purposes, the Indicated Parties suggest that the Department modify this provision to state that: "During the first year following the Retail Access Date, customers may notify the distribution company of their intent to return to Standard offer service, and shall be permitted to do so not more than 120 days thereafter." Competitive suppliers may be interested in offering one year contracts for generation service, but the regulations as proposed could discourage such contracts since customers wishing to contract on that basis would be forced to sacrifice their ability to return to standard offer service. Our proposed modification will allow customers to experiment with competitive supplier service for a full year before having to make an election whether or not to return to standard offer service.

Historic Customer Information

In subsection 12, the regulations discuss a distribution company's obligation to provide historic usage information to competitive suppliers and electricity brokers. (Attachment A at A-21). The Indicated Parties support the direct disclosure of information from the distribution

company to the supplier upon appropriate customer authorization, recognizing that there may be justifiable differences in the quality and amount of data available as among customer classes. However, the Indicated Parties are concerned about the vague time requirements for such disclosure imposed on the distribution company, which is required only to "exercise best efforts" and act on "a timely basis". If the Department decides not to add, as seems appropriate, set period for disclosures, then the Department should closely monitor the exchange of information and be prepared to intervene if necessary.

In addition, the Indicated Parties request that the Department revise subsection 12(b) to allow the customer **or the competitive supplier**, rather than the distribution company, to make the choice of whether the data response is provided in writing or electronically. If, however a distribution company prefers not to provide electronic responses, then the distribution company should be permitted, on a showing of impracticability, to provide the data in written form only. If the Department ultimately allows the distribution company to elect the method of response, then there should be no incremental charge to the customer for electronic data because the customer has no discretion in selecting the form. If the election is the customer's (or the supplier's) choice, then the Indicated Parties, in furtherance of encouraging the development of an electronic communications network, are willing to pay a reasonable incremental charge. **Load Profile Information**

The Indicated Parties also propose that the Department add a provision to Section 11.04 (12) that requires the distribution companies to provide load profile information based on rate class and geographical area to licensed competitive suppliers without requiring specific customer authorizations. The concerns regarding customer privacy are not at issue since the information

will not be customer specific, while providing licensed competitive suppliers a better understanding of the aggregate service area, in order to assist their decision on whether or not to attempt to market there.

Section 5, Competitive Supplier Requirements.

Licensing Requirements

While the Indicated Parties recognize that the Act requires the Department to license all competitive suppliers, we also recognize that it may be appropriate to have somewhat different standards and licensing requirements for competitive suppliers that serve residential customers and for competitive suppliers that only serve commercial and/or industrial customers.

The following are specific proposed revisions to the licensing requirements, Section 11.05 (2)(b).

- Section 11.05 (2)(b)(5): The Department's interest in establishing the financial creditworthiness of a supplier can be established by requiring submittal of generally accepted and well-established commercial credit reports such as Dun & Bradstreet which will provide pertinent information related to bankruptcy. Information regarding mergers and acquisitions in and of itself provides no additional assistance to the Department in assessing an applicant's creditworthiness. The Indicated Parties recommend that this requirement be changed to require submittal of generally accepted and well-established commercial credit reports such as Dun & Bradstreet ratings.

- Section 11.05 (2)(b)(6): The Indicated Parties do not object to providing to the Department for information the name, title, phone number and other means by which a customer contacts the Customer Service Department. Suppliers have a direct business interest in providing customers with the means to quickly and effectively access customer service departments or customer representatives. The Department should however refrain from specifying the detail of how this will be accomplished. To require a toll free number is imposing an unnecessary and additional expense on businesses. The toll free telephone number requirement should be deleted, at a minimum with regard to commercial and industrial customers.
- Section 11.05 (2)(b)(11): The Indicated Parties recommend that the Department allow any proprietary information, in particular information regarding purchase power contracts, to be redacted by the applicant and not be made subject to public disclosure, as to require otherwise threatens competitive injury. In addition, the Indicated Parties request that the Department clarify this provision to only include contracts in which an electric company is purchasing power <u>from</u> the applicant, its affiliates, its parent, or its subsidiaries. Furthermore, the Indicated Parties propose that the Department eliminate the requirement that the applicant include documentation that above-market contracts are currently subject to renegotiation, since this provision attempts to achieve objectives that are beyond the scope of this rulemaking.

- The Indicated Parties request that the Department allow applicants to file updated information and material changes with the Department within **60 days**, as in our judgement, that amount of time will be needed by suppliers active in multiple markets around the country. See Attachment A at A-23.

Sample Bill Requirements

In subsection 2(b)(16), the regulations require the competitive supplier to file a sample bill with the licensing application:

> A sample Bill from those Competitive Suppliers that plan to bill Retail Customers in accordance with the passthrough billing option, as set forth in 220 CMR 11.04(10)(c);

(Attachment A at A-23). The Indicated Parties appreciate the Department's desire to review the competitive supplier's sample bill before the actual bills are sent to customers, but the Indicated Parties are concerned that the Department may expect the sample bill and the actual bill for each customer to be identical. The Indicated Parties recommend that the Department eliminate this requirement. If, however, a sample bill remains a requirement, then the Indicated Parties request clarification that the sample bill will serve only an illustrative purpose and not be mandated as the only format allowed by the Department. The generation service bill can be presented in a variety of ways depending on the nature of the commercial deal agreed to by the competitive supplier and the individual customer and are not likely to be the same for all customers or classes of customers.

Billing

In Section 11.05 (3), the Department sets forth regulations regarding billing and termination procedures for the competitive supplier, including the following:

> (A) Each Bill issued by a Competitive Supplier to a Retail Customer

> shall include separate lines for (1) electricity consumption, generation price (rate per kilowatthour), generation cost (total dollar amount owed), and (2) transmission price and transmission cost, when applicable. (emphasis added)

(Attachment A at A-24). Similar to their concerns regarding sample bills, the Indicated Parties believe that the Department should allow greater flexibility with the actual bill formats. As discussed above, in this new robust and vibrant competitive market, the Department should allow the competitive suppliers and customers to determine what bill format is preferred and not be forced into a single cookie-cutter mold. For example, a competitive supplier could make an arrangement with its customers to sell power at 80 percent of the previous year's cost and not give an actual price per kilowatt hour. The Department should facilitate the provision of less conventional services and pricing mechanisms by providing greater latitude in bill formats for competitive suppliers. To reach this objective, the Department should eliminate or make optional the requirement that each bill include a separate line for generation rate per kilowatt or allow the competitive supplier to satisfy this line requirement by stating that this information is "not applicable".

Termination

The Indicated Parties propose that Section 11.05 (3)(b) be eliminated because it is both duplicative and confusing. (Attachment A at A-24). As the Indicated Parties interpret the termination provisions, subsection (c) subsumes section (b), since subsection (c) discusses (i) the effects of a pending complaint and (ii) that final notices of termination can not be rendered until after 45 days from receipt of the first request for payment. Alternatively, the purpose of Section (3)(b) must be clarified.

Conducting Business with Unauthorized Entities

Section 11.05 (5) provides:

> A Distribution Company, Competitive Supplier or Electricity Broker may not do business with any Competitive Supplier or Electricity Broker that has not been licensed by the Department to do business in the Commonwealth pursuant to 220 CMR 11.05 (2).

(Attachment A at A-26). While the Indicated Parties recognize the need to ensure that only licensed competitive suppliers and electricity brokers are providing actual generation services to Massachusetts customers, the Indicated Parties consider this provision to be too broadly worded. Only the last person in the chain, *i.e.*, the competitive supplier who sells generation to the Retail Customer should be required to be licensed by the Department. Upstream suppliers are under federal jurisdiction. Also, a competitive supplier may have business with another competitive supplier located outside of the state who is not licensed by the Department.

In addition, it is unclear what the phrase "do business with" means. For example, a competitive supplier may be in the process of obtaining its license while at the same time developing its relationship with the distribution company and/or potential customers. The breadth

of this wording could also undermine the ability of a licensed competitive supplier to enter into financial relationships with other entities. For this regulation to remain, it should be more narrowly drawn to address only the prevention of a non-licensed competitive supplier or electricity broker from providing generation services directly to retail customers.

Section 6, Information Disclosure Requirements.

As potential competitive suppliers in the Massachusetts electric industry, the Indicated Parties are most concerned with the Department's regulations regarding information disclosure. While the Indicated Parties recognize that the Act requires certain information disclosure requirements and standards, the Indicated Parties encourage the Department to allow maximum flexibility regarding mandated disclosure. Under the proposed regulations, competitive suppliers would be required to disclose fuel sources, prices, emission characteristics, labor characteristics, and the terms of contracts. Several of these requirements are objectionable and inappropriate for a competitive marketplace. Disclosure of proprietary and commercially sensitive pricing and sourcing information will create a significant and unjustifiable barrier to competition.

The Indicated Parties are also concerned that this detailed disclosure requirement is impractical since the competitive suppliers' supply arrangements may not match-up with the disclosure requirements. The Indicated Parties strongly believe that information disclosure should be a free market decision and that the competitive supplier should be able to make representations of its choosing, fully recognizing that to do so may limit the markets available to it. The current regulations appear to force all of the competitive suppliers inside one box and to limit the ability of each to take advantage of the market's new and varied opportunities. Furthermore, the competitive supplier may not know the characteristics of its actual energy source(s) until the last

minute in this fluid market, such that the sources used in the reporting period may be very different than the sources the customers actually receive.[3]

In response to the Department's request for comments on the format of the information disclosure label, the Indicated Parties object to a requirement that the disclosure information be forced to conform with a predetermined standardized format. The Indicated Parties believe that competition among competitive suppliers, if permitted to operate without undue restrictions, will result in pricing and information disclosure provisions that will creatively address the needs of specific customers and customer groups. The Indicated Parties submit that the use of a standardized format will unduly restrict the creativity of a competitive market place in responding to customer needs. In such instances the electric customers of Massachusetts may well be deprived of the opportunity to reap all of the cost savings and other benefits of deregulation. There are a number of important matters in the restructuring process that may best be addressed by standardized formats, but information disclosure and pricing provisions are not one of them.

The following are specific proposed revisions to the regulations on information disclosure requirements.

- Section 11.06 (2)(b): Although the Act requires the price of generation to be included on the label, the Indicated Parties do not believe that average pricing is the proper method of disclosing pricing information. Instead, Indicated Parties propose that competitive suppliers be directed to report the <u>maximum</u> prices by

[3] As load-serving entities, the Indicated Parties recognize that NEPOOL imposes certain resource obligations and feel it is counter-productive to be further constrained by the Department. Also, the Indicated Parties are aware that both the NERC and the FERC are undertaking inquiries to determine the extent to which information on source and sink should be required for transmission scheduling.

customer class for the relevant time period. The use of maximum prices should help to avoid customer confusion which is likely to result from average price reporting. Furthermore, the Indicated Parties propose that the Department allow the competitive suppliers to clearly state that any pricing information disclosed is merely illustrative and not necessarily reflective of actual prices, since the actual price will be negotiated by the individual customer and the supplier.

- Section 11.06 (2)(d)(1): If the information regarding the resource portfolio is unavailable to the competitive supplier, for example because the resource was purchased on the spot market or through a power exchange, the supplier should be able to note this on the label. The Department should allow the kilowatts not associated with Known Resources to be identified in this way, instead of requiring the supplier to deem the resources as derived from the residual system mix, "system power".
- Section 11.06 (2)(d)(3): Although the reference emission rate is the New England regional average emission rate, the Indicated Parties suggest that the Department allow the competitive suppliers to reference other regional average emission rates, if applicable. Permitting competitive suppliers to reference the regional averages that are applicable to where the resources comes from will allow the customers to determine if the emissions are acceptable when compared to other emissions in that particular region.
- Section 11.06 (2)(d)(4): Although the Act requires the competitive suppliers to include labor characteristic information, the regulations are overly broad. The Act

requires suppliers to report on whether the suppliers operate under collective bargaining agreements and whether the suppliers operate with employees hired as replacements during the course of a labor dispute. This provision should be modified to require the suppliers to only report on their own labor characteristics and not the characteristics for all known resources.

- Section 11.06 (4)(b): The Indicated Parties request that the Department eliminate this provision, which requires load-serving entities to provide the information disclosure label to retail customers quarterly. The Indicated Parties believe that providing the label upon initiation of service and upon the customer's request is sufficient.
- Section 11.06 (4)(c): The Indicated Parties have no objection to full disclosure of the terms and conditions of sales to our customers. However, the indicated Parties do **strongly object** to providing the information to any person upon request. The Terms of Service are a contractual matter between the customer and supplier, and are confidential. To provide confidential information to any person upon request would violate the customer's rights to privacy and to freely contract. This provision should be eliminated.
- Section 11.06 (6): The Indicated Parties object to the regulations' requirements that all written advertisements include in a "prominent position" the disclosure label. At most, the Department should require the advertisements to indicate that the customers may obtain the disclosure label upon request. The Indicated Parties support the position that the competitive suppliers are operating in a free market

and should be able to determine whether to include collective bargaining, emission, and fuel mix characteristics in their advertising.

Section 7, Complaint and Damage Claim Resolution.

The Indicated Parties propose that the Department add a provision to Section 11.07 (3) for competitive suppliers who are victims of slamming. The proposed provision would enlarge the anti-slamming provisions to provide competitive suppliers the opportunity to file complaints and attempt to redress grievances against competitive suppliers who have acted inconsistently with the slamming regulations.

CONCLUSION

As the generation market evolves, as customers gain experience, and as the Independent System Operator develops the ability to provide independent verification of more detailed and diverse disclosure forms, the Department should be willing to adjust its rules to facilitate the ability of the retail market to begin to operate as a free market system. The Indicated Parties request that the Department approve the regulations with the above modifications, which will remove at the outset some of the competitive obstacles and help accomplish the legislative objectives underlying the Electric Industry Restructuring Act.

Respectfully submitted,

Douglas F. John, Esq.
Joelle K. Ogg, Esq.
JOHN & HENGERER
1200 17th Street, N.W.
Suite 600
Washington, D.C. 20036

Counsel for

NorAm Energy Management, Inc.
Electric Clearinghouse, Inc.
Amoco Energy Trading Company
Shell Energy Services Company, L.L.C.
Eastern Power Distribution, Inc.

Dated at Washington, D.C.: January 30, 1998.

F:\word\321\pleading\DPU96100.WPD